

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

RED BARN MOTORS, INC., PLATINUM )  
MOTORS, INC., and MATTINGLY AUTO )  
SALES, INC., individually and on behalf of )  
other members of the general public similarly )  
situated, )

Plaintiffs, )

v. )

COX ENTERPRISES, INC., COX )  
AUTOMOTIVE, INC., NEXTGEAR CAPITAL, )  
INC. F/K/A DEALER SERVICES )  
CORPORATION, successor by merger with )  
Manheim Automotive Financial Services, Inc., )  
and JOHN WICK, )

Defendants. )

Case No. 1:14-cv-01589-TWP-DKL

**DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION  
TO EXCLUDE EXPERT TESTIMONY OF DAVID P. HOFFMAN**

Plaintiffs have offered no valid reason for excluding testimony from Defendants' damages expert. Per the Court's Scheduling Order [Doc. 144, 177], NextGear Capital, Inc. ("NextGear") was required to serve its expert reports by February 10, 2017, and it did so. If NextGear had failed to disclose any expert testimony by the deadline, Plaintiffs would undoubtedly argue NextGear waived the right to later use such expert testimony at trial.

NextGear has not yet filed an answer, a counterclaim, or defenses to the operative complaint in this action because its timely motion to dismiss [Doc. 126] remains pending. *See* Fed. R. Civ. P. 12(a)(4). Nevertheless, in case the Court's ruling on that motion does not resolve all issues in the case, NextGear has, out of an abundance of caution, disclosed expert testimony relating to its potential defenses and counterclaims. In light of the expert disclosure deadlines set

by the Court and the proximity of the trial date set by the Court (August 28, 2017), it was not clear NextGear would have a further opportunity to disclose any expert witnesses after pleading.

Plaintiffs' motion is premature at best, particularly given their own argument that the relevance of the testimony is to be measured against NextGear's answer, counterclaim, and/or defenses, which are not yet due. In fact, Plaintiffs have expressly purported to reserve "all rights" to challenge the testimony until then. (*See* Motion to Exclude [Doc. 183], at 2.) Moreover, Plaintiffs have not even deposed the witness yet; they have noticed his deposition for March 30, 2017. The Court should not exclude potentially relevant testimony simply because NextGear has not yet been required to plead under the rules of the Court.

Apart from the timing issue, Plaintiffs appear to acknowledge the expert's proposed testimony would be relevant to the damage claims of Plaintiffs Platinum Motors, Inc. and Mattingly Auto Sales, Inc. With respect to Plaintiff Red Barn Motors, Inc., Plaintiffs only provide "as an example" that they believe any setoff defense is precluded by Red Barn's elaborate bankruptcy plan of reorganization, which does not explicitly mention NextGear or its claim. To the extent that argument has any validity, which NextGear does not concede, that issue can be resolved after NextGear pleads and at or before trial, but it is not grounds to preclude the expert's mere calculation of the potential offset amount at this stage.

Because Plaintiffs are already set to depose the witness later this month; because he will offer relevant testimony on other issues and on setoff claims for at least two of the Plaintiffs; and because the case is set for a bench trial rather than a jury trial, denying Plaintiffs' request will impose little or no incremental burden on the parties or the Court. The Court should therefore deny Plaintiffs' Motion to Exclude Expert Testimony of David P. Hoffman.

Respectfully submitted, this 22nd day of March, 2017.

s/ Tracey K. Ledbetter

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel of record via the Court's electronic service notification system, this 22nd day of March, 2017:

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